

Internal Revenue Service  
**memorandum**

CC:TL-N-2175-89

Br2:WDHussey

date: FEB 02 1989

to: District Counsel, Philadelphia  
Attn: Theodore L. Marasciulo

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

This responds to your memorandum of December 19, 1988. It encloses copies of Petitioner's Interrogatories to Respondent and Petitioner's Request for Production of Documents. Petitioner broadly asks for discovery of all formal and informal positions and policies, both published and internal, taken by the Service and the Department of Justice with regard to two issues: the "mortgage-swap" issue, relating to the reciprocal sale and purchase of mortgages and mortgage participation interests by lending institutions; and the treatment of premature withdrawal penalties from certificates of deposit as discharge of indebtedness income. You ask us to identify the documents corresponding to petitioner's requests, and specify what type of privilege may be applicable.

By telephone conversation on January 10, 1989, Mr. Robert M. Ratchford informed Mr. William D. Hussey that he had filed an objection in the Tax Court that petitioner's requests were overly broad, seeking information in many cases publically available, or protected by governmental or work-product privilege. Clarifying the memorandum of December 19, 1988, Mr. Ratchford asked that he be provided a list of identified documents embodying Service position which he can read to the Court if so asked. Mr. Ratchford has since left the Service. On January 23, 1989, Mr. Hussey spoke with Mr. Theodore L. Marasciulo, who is now handling the case. Mr. Marasciulo confirmed that a continuance has been granted, and that a conference call is scheduled for March 1989 with respect to the problem of discovery of documents. Trial is set for [REDACTED].

Mr. Ratchford had asked that copies of any OM's (Office Memoranda) and ISP (Industry Specialization Program) papers with respect to both the mortgage swap and premature withdrawal penalty issues be forwarded, as well as some recently filed appellate briefs concerning the mortgage swap issue. We enclose copies of the requested documents. We also forward a copy of recently approved, soon-to-be distributed Litigation Guideline Memorandum TL-59. However, as explained more fully below, we

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caution that most of these documents should not be identified to the petitioner or the Tax Court.

We have discussed this matter with Joseph J. Urban, Technical Assistant, and Margo L. Stevens, Executive Assistant, of the Office of Assistant Chief Counsel (Disclosure Division), both at FTS 566-3074. As listed below, revenue rulings, GCM's (General Counsel Memoranda), and briefs filed with the courts may be identified as sources of Service position. As these documents are publicly available, copies need not be furnished to petitioner.

However, other types of documents, also listed below, that set forth Service policy should not even be mentioned. Two distinct privileges are available with respect to the CM, ISP Litigation Position Papers, Appeal Letters, and Litigation Guideline Memorandum named below. These are the attorney work product privilege and the deliberative process privilege (generally called "governmental privilege"). A definitive answer whether either or both privileges is applicable to a given document would require a case-by-case examination of each document by the Disclosure Division. This has not been considered necessary, for the reason that none of these documents should be identified to the petitioner or the Tax Court as a source of Service "position." However, some general discussion of the work product and governmental privileges is provided for your assistance. It is important to note that a document will lose the governmental privilege if it is identified as a "position."

The attorney work product privilege permits development of legal theories without fear of perusal by an adversary. The privilege is limited to documents prepared by attorneys in anticipation of litigation. Once the privilege applies to material prepared in anticipation of litigation, the material remains privileged after litigation ends. The work product privilege extends to memoranda advising an agency of the types of legal challenges likely to be mounted against a proposal program, potential defenses, and likely outcome. The privilege prevents an adversary from probing the agency's assessment of the program's vulnerabilities in order not to miss anything in crafting a case against the program. Delaney, Migdale & Young, Chartered v. I.R.S., 826 F.2d 124 (D.C. Cir. 1987).

The governmental privilege (called "executive privilege" by the Claims Court) embraces predecisional, deliberative material, i.e., recommendations of a government officer which reflect the personal opinion of the writer rather than the policy of the agency. A document is "predecisional" if it was generated before the adoption of an agency policy. A document is "deliberative" if it reflects consultative give-and-take, weighing the pros and cons of adopting a viewpoint. Even if a

document is predecisional when prepared, it can lose that status if adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980).

Appeal letters written to the Department of Justice recommending appeal of cases lost by the Service in the Tax Court or District Courts are clearly covered by the work product privilege applicable to documents prepared in anticipation of litigation. While it would therefore be generally harmless to name their existence in response to a discovery request, it is also generally pointless to do so. The briefs submitted by the Department of Justice are themselves the final position presented in the litigations.

OM 20150, [REDACTED], I-020-88 (Sept. 1, 1988) the only OM considering the subject of mortgage swaps or premature withdrawal penalties, falls within the work product privilege, although OM's do not always do so. In OM 20510, the Tax Litigation Division asked the opinion of the Interpretative Division whether certain arguments could be presented in litigating mortgage swap cases. If an affirmative reply had been received, the arguments would have been presented in cases whose litigation had already begun when the advice was asked. Because OM 20510 was a National Office document that did not issue "final" guidelines to field offices, it also comes within the governmental privilege. Coastal States, *supra*, would make the governmental privilege difficult to assert if field guidelines had been issued in the OM. Coastal States refused to apply the privilege to Department of Energy regional counsel memoranda to field offices that interpreted regulations within the context of particular facts encountered during audits.

ISP Litigation Position Papers are viewed as falling within the work product privilege because they are prepared in anticipation of litigation. The argument can be made that they are also covered by governmental privilege because the final position of the Government is reflected in the briefs filed in the courts. However, ISP "position" papers are obviously vulnerable to a Coastal States - type attack because they issue field guidelines. <sup>1</sup>

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<sup>1</sup> Coastal States even casts some doubt on how much security there may be under the attorney work product privilege. It states that to argue that every audit is potentially the subject of litigation goes too far; documents must at least have been prepared "with a specific claim supported by concrete facts which would likely lead to litigation in mind." 617 F.2d at 865. Fortunately, the subsequent case of Delaney, Migdale, *supra*, (continued on next page)

Litigation Guideline Memoranda fall within the work product privilege because they are prepared in anticipation of litigation. Sometimes litigation guideline memoranda can also be protected under a privilege for documents which specify law enforcement criteria. Obviously, there is vulnerability to a Coastal States attack on the governmental privilege since these documents issue field guidelines.

Documents reflecting Service position on mortgage swaps and premature withdrawal penalties are:

Mortgage Swaps

I. Documents identifiable as Service position:

Rev. Rul. 81-204, 1981-2 C.B. 157 (considered in GCM 38838, infra)

Rev. Rul. 85-125, 1985-2 C.B. 180 (considered in GCM 39149, infra)

GCM 38838, [REDACTED], I-49-81 (April 19, 1982)

GCM 39149, [REDACTED], I-166-82  
(March 1, 1984)

GCM 39551, [REDACTED]  
I-087-84 (Aug. 20, 1986)

Briefs filed with Tax Court by Service in Cottage Savings Association v. Commissioner, 90 T.C. 372 (1988), appeal docketed, No. 89-1036 (6th Cir., Jan. 9, 1989)

Briefs filed with Tax Court by Service in Federal National Mortgage Association v. Commissioner, 90 T.C. 405 (1988), appeal docketed, No. 88-1827 (D.C. Cir., Nov. 17, 1988)

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cautions against too broad a reading of Coastal States. Delaney, Migdale refused to allow disclosure of memoranda advising of legal challenges likely to be raised against an IRS program and available defenses. The taxpayer was seeking the Service's assessment of the program's legal vulnerabilities in order not to miss any arguments rather than seeking the Service's view of the law in order to comply. However, the situation remains somewhat murky; the program in Delaney, Migdale was only a "proposed" program and the memoranda were advisory, rather than an "agency manual, fleshing out the meaning of the statute." 826 F.2d at 124.

Memorandum of Law filed with Tax Court by Service in San Antonio Savings Association v. Commissioner, T.C. Memo 1988-204, appeal docketed, No. 88-4717 (5th Cir., Sept. 29, 1988) (in support of motion for summary judgment)

Briefs filed with District Court (N.D. Tex.) by Department of Justice in Centennial Savings Bank FSB v. United States, 682 F. Supp. 1389 (N.D. Tex. 1988), appeal docketed, No. 88-1297 (5th Cir., May 5, 1988)

Briefs filed with District Court (W.D. Tex.) by Department of Justice in First Federal Savings & Loan Association of Temple v. United States, 694 F. Supp. 230 (W.D. Tex. 1988), appeal docketed, No. 88-1723 (5th Cir., Sept. 23, 1988)

Briefs filed with Court of Appeals (5th Cir.) by Department of Justice in Centennial Savings Bank FSB, supra

Opening Brief filed with Court of Appeals (5th Cir.) by Department of Justice in First Federal Savings & Loan Association of Temple, supra

Opening Brief filed with Court of Appeals (5th Cir.) by Department of Justice in San Antonio Savings Association, supra

II. Documents not to be identified:

OM 20150, [REDACTED], I-020-88 (Sept. 1, 1988)

Savings and Loan ISP Litigation Position Paper,  
Re: [REDACTED] (Feb. 2, 1988)

Savings and Loan ISP Litigation Position Paper,  
Re: Loan Swaps in Light of Arkansas Best Corp. v. Comm'r (Nov. 18, 1988)

Appeal Letter (to Tax Division, Department of Justice)  
dated Aug. 19, 1988, San Antonio Savings Association,  
supra

Appeal Letter dated Sept. 29, 1988, First Federal Savings & Loan Association of Temple v. United States, supra

Appeal Letter dated Oct. 5, 1988, Federal National Mortgage Association, supra

Appeal Letter dated Oct. 24, 1988, Cottage Savings Association, supra

Premature Withdrawal Penalties

I. Documents identifiable as Service position:

Rev. Rul. 83-60, 1983-1 C.B. 39 (not reviewed by Chief Counsel - no GCM)

Briefs filed with Tax Court by Service in Colonial Savings Association v. Commissioner, 85 T.C. 855 (1985), aff'd, 854 F.2d 1001 (7th Cir. 1988)

Briefs filed with District Court (N.D. Tex.) by Department of Justice in Centennial Savings Bank FSB, supra

Briefs filed with Court of Appeals (5th Cir.) by Department of Justice in Centennial Savings Bank FSB, supra

Briefs filed with Court of Appeals (7th Cir.) by Department of Justice in Colonial Savings Association, supra

II. Documents not to be identified:

Savings and Loan ISP Litigation Position Paper, Re: Premature Withdrawal Penalties (Feb. 19, 1988)

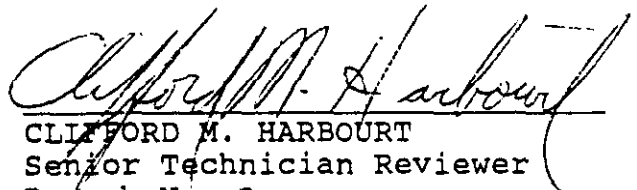
Litigation Guideline Memorandum, TL-59  
Premature Withdrawal Penalties (Nov. 8, 1988)

Appeal Letter dated April 28, 1988, Centennial Savings Bank FSB, supra

If we can be of further assistance, please let us know.

MARLENE GROSS

By:

  
CLIFFORD M. HARBOURT  
Senior Technician Reviewer  
Branch No. 2  
Tax Litigation Division

Enclosures:  
As stated